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Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 225.

JOSEPH A. SAWYER AND NELLIE A. SAWYER,
PLAINTIFFS IN ERROR,

VS.

DANIEL S. PIPER,
DEFENDANT IN ERROR.

ARGUMENT BY PLAINTIFF IN ERROR.

H. W. CHILDS AND J. A. SAWYER, - - - Counsel for Plaintiffs in Error.

Supreme Court of the United States.

October Term, 1902.

No. 225.

JOSEPH A. SAWYER and NELLIE A. SAWYER,
Plaintiffs in Error,

Against

DANIEL S. PIPER, Defendant in Error.

ARGUMENT BY PLAINTIFF IN ERROR.

My briefs herein having been of necessity dictated from a sick bed with no opportunity to enter upon investigation save by means of recollection, and that limited by lack of power of mental application consequent upon serious illness, are, I think, much lacking upon several points. It being still doubtful whether my health will allow an oral argument, it seemed well to seek to present in writing certain matters more fully.

Premising, as perhaps sufficiently shown in my briefs, these facts, viz.: The trial court's refusal to hear or consider the offered defenses was based solely upon want of power—that it was concluded

by the opinion and direction of the State Supreme Court. The affirmance of the judgment in the Supreme Court is placed upon the same ground. Their demand was by plaintiffs in error based upon the first clause of the 14th amendment to the Federal constitution, and presented a purely Federal question. That this demand was refused and the asserted Federal right denied by both state courts is patent from the record, and stands admitted. Jurisdiction in this court follows necessarily.

Swafford vs. Templeton, 185 U. S. 487-493.
Equitable Life Society vs. Brown, 23 S. C. R., 123-124 (Dec. 1st, 1902.)

Telegraph Co vs Hardy 162 U.S. 334-5.

But this court will upon the merits examine all the reasons offered in justification of the decision that no Federal rights of these plaintiffs in error had been denied or abridged. That the sole *decision* of that court is its holding of res judicata, is, perhaps sufficiently shown in my briefs. As to the remainder of the opinion it is claimed:

(1) It assumes as material facts matters which the record shows do not exist.

(2) It ignores controlling facts contained in the record.

(3) In effect it materially misstates both the issues and the record.

(4) It is contrary to the well settled law of that state.

(5) It is contrary to and destructive of fundamental principles of law.

(6) As its necessary result, it denied to plaintiffs in error the due process of law guaranteed to them by the Federal constitution.

PRELIMINARY.

The question before the court is "Is the refusal to hear the offered defenses justifiable?" This portion of the opinion is but an attempt to justify such exclusion. Its final decision therefore is for this court.

McCullough vs. Virginia, 172 U. S. 102.
Missouri Ry. Co. vs. Elliott, 184 U. S. 695.

(1) The opinion assumes non-existent facts.

It is predicated upon the assumption that all the parties, by consent, tried the cause in the district court upon the theory that defendants owed to that plaintiff an uncertain sum, upon some one or more of several causes of action which might arise out of the stated facts. Though such causes of action are mutually destructive, yet, by consent they might be submitted together for decision as to which exists, and what the remedy thereon. But this record shows the exact contrary. Though the complaint be somewhat in line with the hypothesis of the court, the course of the trial disproves it. By his refusal to accept the proffered judgment based on the equitable mortgage; by his proofs resting upon the forfeiture of all rights under the contract and the non-existence of that mortgage—proofs indispensible to any recovery upon the old mortgages;

by his insistance upon such refusal and repudiation until final judgment and by his persistence in forcing in this evidence over objection and exception, respondent not only elected to stand solely upon his causes of action based upon the old mortgages, but effectively eliminated the equitable mortgage from the trial. Indeed, these facts are clearly set forth in the judgment of the trial court, viz., (38) "Now, "therefore, on motion of Messrs. Wheelock & Sperry, "and Robert Taylor, attorneys for said plaintiff, it is "hereby adjudged and decreed as follows:

"First. That the said agreement of February "19, 1895, fully set forth in the complaint herein, "and the transaction of which it was a part, did not "and does not extinguish by merger or otherwise "any of the notes and mortgages therein and in the "complaint and findings hereinafter set forth; that "default has been made in the terms and conditions "of said agreement, as in the complaint and findings "receited, and that said agreement and the rights of "the said Joseph A. Sawyer and Nellie A. Sawyer, "thereunder be and they are determined, and have "ceased."

It is also in part stated in the findings, viz., [32] "Tenth. That before the commencement of this ac- "tion the plaintiff did declare to said Sawyer and "his wife the forfeiture by them of their rights under "said agreement by reason of their default in making "said continuous monthly payments."

Indeed, the cornerstone of both judgment and findings is the forfeiture of the contract and non existence of the equitable mortgage. That court ap-

plied all the payments made upon that, to the old mortgages (31.)

(2) Ignores Controlling Record Facts.

Not alone those last above stated are ignored, but the defense of bad faith and oppression, both in the preceding suit and in pressing the demand for the $3000. over the contract amount of all the indebtness, sought through foreclosure of the old mortgages, this being done immediately upon the decision in the ejectment suit that the equitable mortgage did exist, and his futile effort therein to recover upon it. While the motive underlying the prosecution of an actual cause of action is immaterial, not so where one known to be baseless is prosecuted to final issue, with design thereby to oppress and despoil. Such plaintiff during its entire course, openly repudiating his real cause of action and spurning the full relief thereon offered and *open to him throughout.*

(3) Material Matter in the Record Essentially Misstated. Carter v Texas 177 U.S. 443. – 449

(a) The offered defenses. The court thus states them (182 bottom,) "Because plaintiff had brought "his action to foreclose the original mortgages, and "had refused defendant's offer to allow judgment of "foreclosure as to the equitable mortgage his rem- "edy under the latter became lost, and he thereby "estopped himself from asserting any rights there- "under."

This wholly omits the essentials of the real defenses offered and states only a portion of one of the reasons offered on the first appeal why, in that ac-

tion no such foreclosure should be allowed. Indeed, the court directly following the above, states (183),

"The identical question presented by the pro-"posed answer was presented and argued to this "court on the former appeal and is therefore res ad-"judicata."

Again it is stated (183, p. 103);—

"Plaintiff did not waive his rights under the "equitable mortgage, by asking in his complaint "that the original mortgages be foreclosed." This was never questioned. But it is a wholly erroneous statement of our position, upon the first, as well as the second appeal.

The court so far correctly stated that plaintiff's position throughout the entire trial and first appeal, thus:—(183) "Acting on the theory that the new "agreement operated only as a modification of the "contract between the parties as made up by the "mortgages." Had it added "and that by the failure "to pay the equitable mortgage it lost all vitality, "and all defendant's rights under the new agree-"ment instantly perished by the forfeiture," that portion would have been fully stated, but such full statement would but illy comport with the statement [183, p. 103] that the causes of action upon the old mortgages were not inconsistent with that upon the equitable mortgage.

Contrary to the Well Settled Law of that State. (4 and 5)

The practically universally accepted principle of pleading and practice, that, save by consent of the parties, a plaintiff may not unite and try in a single

action several causes of action which are mutually destructive, nor a defendant unite in one answer several such defenses, has long been settled law in Minnesota.

In the Steenerson case, inconsistency was thus defined by the court:—"Separate and distinct defenses "are consistent when both may be true, and only "held inconsistent when proof of one necessarily dis- "proves the other."

Steenerson vs. Waterbury, 52 Minn. 211.

It is apparent that the court did not intend in this action to affect this law. See statement that there is no inconsistency, based on the ground that the original loans and obligations were consistent, and that a single action might have been maintained to recover the entire debt.

The prejudice to these plaintiffs in error resulting from this infraction of the rule is apparent. They were forced either to abandon all defenses and submit to spoliation, or try two actions (on a single demand) throughout the trial and supreme courts of the state, and one of them by writ of error in this court. Multiplicity of suits in its most odious form, coupled with intended oppression and spoliation, is sanctioned by this ruling. To uphold such practice is to open a wide avenue to fraud, sharp practice and over-reaching in courts of justice, while as I think, if the bad faith and oppression could be proven in such case the courts would give prompt relief, the difficulties lie deeper. Proof of the fraud is often not ob-

tainable. Still more often the victim—defendant—is unable to carry on the one-sided fight and submits to extortion from lack of power to resist. Virgil's fable of the Laocoon finds full exemplification in this, —making the temples of justice the secure abiding places of slimy monsters of human passions and greed.

(6) In Essence, a Denial of Due Process of Law.

The settled law in Minnesota requires that an offered supplementary answer be allowed, on due showing, to be filed *as matter of right* unless barred by laches or other defaults.

Malmsten vs. Berryhill, 63 Minn. 1

See Schmidt vs Hager Minn 93 N.W.R 111

Its sufficiency must be tested in the orderly manner by demurrer or motion, either of which allow opportunity for amendment. Here it would have left open to plaintiffs in error their right, by amendments, if needed, to prove their claim of bad faith and oppression. All this appeared, in some form, in their offered answer and evidence. If well founded such defense should most certainly have been sustained, —if ill founded, that fact would appear at the trial, and in either case the litigation would be ended, and full justice meted out to both parties.

Now what was in fact done?

Answer, evidence and all power to present *any defense whatever*, was summarily denied, on the sole ground of res judicata. Any form of trial was also denied, and only a practically ex parte hearing allowed, wherein the court perfunctorily amended its findings and order for judgment, as stated by it, in

form and manner as directed by the Supreme Court. This ruling, and upon this precise ground, was affirmed. The Supreme Court held, not that these facts, but that what was done at the earlier trial and first appeal, afforded ample opportunity to present and have considered, the later proposed defenses, which opportunity was fully availed of. Yet that court states that only the claim that by commencing suit upon the old mortgages and, at the trial, refusing the offered judgment, the plaintiff was estopped to obtain a foreclosure of the other mortgage, in this action. But here is no suggestion of the real offered and excluded defenses, of mala fides, oppression and election of remedies, not at all by bringing the suit, but by repudiating the later sought cause of action and remedy throughout the entire trial and until final judgment.

As I understand the case, this court has held the offered defense sufficient in Warner vs. Godfrey, 186 U. S. 365. That court also has gone far toward, if not established, the recognition of the law and distinctions in election of remedies here contended for. The general doctrine has long been law there. In Wright, Barrett & Co. vs. Robinson, 79 Minn. 272 (decided five months later than this case), which is within the first class of cases, it is held that the election is final and conclusive the instant either of the alternative remedies is adopted. Held further, that it matters not in what form of proceeding it be sought. In Re Receivership Washington Bank 72 Minn. 453, (decided two months earlier than this decision on the first appeal) that in a case within the second

See Rollerson 155 U.S. 13-39

class no controlling election exists prior to the entry of judgment. The court said, "The mere fact that "the assignee brought an action claiming to recover "the merchandise, which was the consideration for "which the notes were given, and dismissed the "action before trial, without having obtained any "relief thereon does not disentitle him to recover the "notes from the bank as a preference."

But to say the least, there was room for serious question *whether or not the defenses offered after the remand were the same as the matter presented and considered before.* Plaintiffs in error *were of right entitled to show in an orderly and adequate proceeding* that they were not the same, and, also, if insufficiently stated or presented to the court, to an opportunity to apply to the court to amend the pleading so as fully to state all their defensive matter. What did they get? Only a summary refusal of any hearing or opportunity whatever. Now, does such summary denial of any hearing constitute due process of law as to this right to show their defenses real and different from the matter previously decided? It was not in the due course of any procedure recognized by the laws of that state, but rather in defiance of such laws. It afforded no adequate or possible opportunity, either for the due and proper presentation, or proper consideration and decision of the defensive matter. It was therefore, wholly lacking in the essential denial of "a day in court" to plaintiffs in error and a denial of due process of law.

Rees vs Waterlown
19 Wall. 123.
Huntington vs
Saidley 176 U.S. 679

Warner vs. Godfrey, 186 U. S. 365.

Pennoyer vs. Neff, 95 U. S. 714-733.

Brown vs New Jersey 175 U.S. 173-175

Justification is wanting for any claim that the rules of law here asserted would unduly restrict the holder of uncertain demands in their prosecution, or the courts in efficient work. Take this case. Had respondent designed no more than a determination by the court as to which of his mortgages was still in force, with a foreclosure thereof, no difficulty need have been met. The underlying facts could have been set forth in his complaint, together with them, and an alternative prayer for relief. Upon the trial all the facts could have been proven, reliance being placed as much upon one as the other. In such case there would be no call for any offer of judgment, but, once made, it would be accepted conditionally upon the finding by the court that the others were non-enforceable. There could be but a single trial; no election of remedies, multiplicity of actions, res judicata or estoppel.

II.

Does not the decision, however made, that the offered defenses were not good, infringe upon the protection guaranteed to plaintiffs in error by the constitutional requirements of equal protection of the laws and of due process of law?

Since no hearing upon them was allowed, all alleged facts offered to be proven must be here consid-

ered as facts in the case. In brief these are: Knowledge in complainant when he commenced this action that his sole existing cause of action was that upon the equitable mortgage; that his insistance upon the old mortgages, with the baseless demand for the extra three thousand dollars, as also his repudiation of the true cause of action and remedy were done in bad faith, and in intentional oppression of plaintiffs in error; that he pressed his chosen action to final issue; that he had throughout that action ample opportunity to recover the entire relief to which he was entitled upon the facts; that the sole reason why he did not obtain his full remedy therein was his refusal to accept it, a refusal persisted in until final judgment; that if later allowed to reverse his course, the inevitable result must be to put plaintiffs in error to the trouble and expense of two trials instead of one (or none had the offer been accepted). And, in effect, to allow the plaintiff to split his cause of action. Even had he then believed his old mortgages valid and the contract forfeited, still by his course he put the entire risk and loss of a double suit upon his adversaries and that without need or reason. No law or rule of practice existed in that state warranting such course. I have endeavored to show above that it is in its nature and effects opposed to the fundamental rights and principles which underlie our system of law, and the national constitution. It necessarily placed that plaintiff and these defendants upon quite different planes of action—conferring upon the former many advantages of which the latter were denied, and tak-

ing from the one what was conferred upon the other placed all the advantages with the complainant and imposing all the disadvantages upon the defendants. This constitutes an arbitrary and uncalled for exercise of power and has long been denounced by this court as a denial both of due process of law, and the equal protection of the laws.

Caldwell vs. Texas, 141 U. S. 209.
See Hurtado vs. California, 110 U. S. 510-535-6,

Wherein this court cited and established the following from Brown vs. Commissioners, 50 Miss. 468: The principle refers to certain fundamental rights which that system of jurisprudence, of which ours is a derivative, has always recognized. *If any of these are disregarded in the proceedings* by which a person is condemned to the loss of life, liberty or property, then the deprivation has not been by due process of law."

In the Caldwell case this court said: "Due pro-"cess is so secured by laws operating on all alike, "and not subjecting the individual to the arbitrary "exercise of the power of government, unrestrained "by the established principles of private right and "distributive justice (citing Bank vs. Oakey, 4 "Wheat. 235-244). The power of the state must "be exerted within the limits of those principles, "and its exertion cannot be sustained when *special, "partial and arbitrary*."

III.

It is respectfully submitted that this case is controlled by that of Warner vs. Godfrey, 186 U. S. 365.

In many particulars absolute identity exists between the two cases. These include a remand with directions to enter a specified judgment—following a decision that no recovery could be had upon the cause of action asserted at the trial; a holding that upon the facts shown upon the trial plaintiff did possess a right of action in the premises and to recover thereon in that action; an order refusing the defendants any opportunity to contest such right of recovery; inconsistency between the two causes of action and a holding upon a later appeal of res judicata; also an offer to the plaintiff, at the trial, of the precise relief later demanded, with a refusal thereof. But on review in this court the judgment was reversed and judgment ordered dismissing the action. This court held:

(1) That in remanding the case to allow the plaintiff to assert a "new and distinct ground of relief constituting a complete departure from the theory upon which the case has been tried," the provision that the case should not be re-opened—thus holding the case open to allow plaintiff to change ground, while closing it against the defendants being heard in defense, resulted in depriving the defendants of all opportunity of defense, and was therefore, a denial of due process of law. Citing Hovey vs. Elliott, 167 U. S. 409.

[2] Since the cause of action first relied upon was "one in substance at war with the theory of the "case propounded against them and which was not made against them" the defendants were justified in not offering evidence upon such claim then repudiated. And that having at the trial in open court offered to the plaintiff the precise relief she demanded later, which offer was refused, thus putting the defendants to the expense of succeeding trials, she was not entitled to any recovery. Action ordered dismissed.

In the Godfrey case it was not questioned but that the plaintiff brought and prosecuted the action in good faith believing she could rightfully recover upon her asserted cause of action. Nor did she then repudiate the other cause of action other than by the fact that the two were inconsistent. There, as here, the record on the first appeal showed the offer, and other facts showing a right to recover upon the other cause of action. In the present case the prosecution of the action was in bad faith. The offer was made at the opening of the case and the omitted cause of action, with the remedy thereon directly and continuously repudiated by the plaintiff. The fact that the Godfrey case came into this court by appeal from a subordinate court is immaterial. Sec. 709 gives this court the same power here as upon appeal, and the gist of that decision was that the defendants had been denied due process of law. While not so distinctly stated yet the same ground appears to exist in support of the ordered dismissal of the action. The points that the amended bill was

not "timely filed" made in the opinion, also that at the trial all the parties treated Warner as the agent of the buyer rather than the seller are not here controlling or even essential. As to the latter, it only appeared that he was so considered, but that matter was then wholly immaterial. As to the former, it is not the basis of the decision. The refusal to allow a defense to be interposed, notwithstanding the direction by the appellate court so to do is the basis of the reversal. The reason for the order of dismissal is thus stated by this court:

"Thus" (by the offer and its rejection) "the de-"fendants were distinctly notified that no adjust-"ment was possible, but that the intention was to "divest them of their property without reimburse-"ment in whole or in part." (Here to extort the extra $3,000 and by its means get the entire property) "The complainant thus having expressly de-"clined to put an end to the litigation, upon the "theory that because of the mala fides of Warner "and Wine she was entitled to an unconditional "recovery of the property, she ought not, in equity, "upon the collapse of her efforts to establish fraud "and bad faith on the part of the defendants, to be "allowed to reform her pleadings and change her "attitude toward the defendants in order to obtain "that which she had expressly elected not to seek, "and had persistently declined to accept."

It does not appear in that case that the offered defense was certainly good, nor that, upon a fair trial it would have been sustained. It did appear that by the decision the plaintiff must lose real es-

tate valued at from $50,000 to $60,000, and for which she received no compensation whatever.

The record here does not show complainant to be remedyless, though he has estopped himself from this relief. It does not appear that he has no other means of recovery, nor is it to be assumed that plaintiffs in error, recovering their property, will be unmindful of the obligation to repay the moneys he advanced.

Complainant having objected to both the supplementary answer and the evidence offered at the perfunctory hearing thereafter, upon the ground that the decision on appeal was res judicata, depriving them of power to present, and the court of right to hear, any defense, and the court having sustained this objection upon that ground, is now estopped to assert that the answer did not sufficiently present the defense intended, and also estopped now to object to consideration of the offered and rejected evidence on the ground that no issue was raised.

Johnson vs. Schuler, 70 Minn. 303.

Schmidt v Hague " 93 N.W.R 110-111

Nor can he now say that as the evidence pleaded and offered did not conclusively show fraud and oppression as actuating him in pressing the suit on the old mortgages it did not go far enough. In either case, had objection been made upon that ground the defect, if any there was, would have then been remedied.

The rule that the decision by a State Supreme Court upon matters of state law and practice binds

this court has no application, where, by means of such decision, a federal right is impaired; hence does not obtain here. If citation of any authorities is permissible in support of this limitation, enough are cited in my briefs.

The fact that the complainant sought to avail himself of the repudiated remedy in the same action, but after final decision therein upon his elected causes of action, is immaterial. It is the substance of the matter of election of remedies and estoppel, not the mere conduit through which they appear in court which controls.

Warner vs. Godfrey 186 U. S. 365.

In the light of the decisions of this court in Swafford vs. Templeton, 185 U. S. 487-493 and the Warner-Godfrey cases, it is submitted that the judgment here in question should at the least be reversed, and all subsequent proceedings vacated.

All of which is respectfully submitted.

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